Supreme Court, U.S.
FILED

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NO. 97-____

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996**

SHIRLEY I. SCRUGGS,

Petitioner,

vs.

DALE S. WILSON and HAROLD "BUDDY" JIMMISON, *ET. AL.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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Wilson V Scruggs (In re Estate of Smith) [21 FLW S332, 1996 Fla.SCt 10830]

IN RE: ESTATE OF CHARLES W. SMITH, Deceased. DALE S. WILSON, et al., Petitioners, vs. SHIRLEY I. SCRUGGS, Respondent.

Supreme Court of Florida.

Case No. 84,385. DALE S. WILSON, et al., Appellants, vs. SHIRLEY I. SCRUGGS, Appellee.

Case No. 84,386.

July 18, 1996.

HISTORY

Two Consolidated Cases: Application for Review of the Decision of the District Court of Appeal - Constitutional Construction, and An Appeal from the District Court of Appeal - Statutory or Constitutional Invalidity. 1st District - Case No. 93-731 (Clay County).

PRIOR HISTORY

Withdrawing opinion in, Substituting opinion at, Rehearing of, Wilson v Scruggs (In re Estate of Smith), 20 FLW S575, 1995 Fla.SCt 14870.

COUNSEL

Counsel: Timothy J. Corrigan and Beth E.

"APPENDIX A"

Luciano of Bedell, Dittmar, Devault & Pillans, P.A., Jacksonville; and Bruce D. Johnson of Donahoo, Donahoo & Ball, P.A., Jacksonville, for Petitioners/Appellants. Barry Fuller of Fuller & Associates, Orange Park, for Respondent/Appellee.

The Motion for Rehearing is granted. The opinion filed in this case on November 22, 1995, is withdrawn and the following opinion dated July 18, 1996, is substituted in lieu thereof.

HEADNOTES

Estates-Paternity-Limitation of actions-Statute of limitations for adjudication of paternity is applicable in action to establish paternity in probate case for purposes of inheritance-There is no separate and distinct statutory cause of action to establish paternity which begins to run upon death of putative father-When claimant failed to bring paternity action within time

required by statute of limitations which was applicable at time of her birth, which established a three-year limitation running from date of birth, her claim was extinguished-Claim cannot be revived because a constitutionally protected property right to be free from the claim has vested in defendant-Application of statute of limitations for paternity actions to claimant's claim is not unconstitutional

ON MOTION FOR REHEARING GRANTED

[Original Opinion at 20 Fla. L. Weekly S575a] [Editor's note: Substituted opinion totally revises the original opinion.] <pg.2>(GRIMES, J.)

We review In re Estate of Smith, 640 So. 2d 1152 [19 FLW D1400, 1994 Fla.lDCA 4765] (Fla. 1st DCA 1994), which expressly and directly conflicts with King v. Estate of Anderson, 519 So. 2d 67 (Fla. 5th DCA 1988), and which declares a state statute to be

invalid. We have jurisdiction. Art. V, § 3(b)(1), 3(b)(3), Fla. Const.

The decedent Charles Smith died in 1992, leaving a will which was admitted to probate shortly after his death. Shirley Scruggs, at the age of sixty, filed a petition for revocation of probate and letters of administration, alleging that Smith had lacked testamentary capacity to make his will and that the will was the product of undue influence. Scruggs further alleged that she was the natural daughter of Smith and would inherit under the laws of intestacy if the will were revoked.

The trial court dismissed Scruggs' claim, finding that section 95.11(3)(b), Florida Statutes (1991), the statute of limitations for adjudication of paternity, barred Scruggs' claim. The district court of appeal reversed and remanded, holding that section 95.11(3)(b) did not apply to bar Scruggs from bringing a paternity action in

probate under section 732.108(2)(b), Florida Statutes (1991), for the purpose of establishing her right to intestate succession. The district court also concluded that if section 95.11(3)(b) were construed to bar Scruggs' claim, the statute would violate the equal protection and access to courts provisions of this state's constitution as well as the equal protection clause of the United States Constitution.

Section 95.11 states in relevant part:

> 95.11 Limitations other than for the recovery of real property.- Actions other than for recovery of real property shall be commenced as follows:
>
> (3) WITHIN FOUR YEARS.-
>
> (b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

In holding section 95.11(3)(b) inapplicable to Scruggs' claims, the district court of appeal referred to section 732.108(2), which

reads as follows:

> (2)For the purpose of intestate succession in cases not covered by subsection (1), a person born out of wedlock is a lineal descendant of his mother and is one of the natural kindred of all members of the mother's family. The person is also a lineal descendant of his father and is one of the natural kindred of all members of the father's family, if:
>
> (a) The natural parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.
>
> (b) The paternity of the father is established by an adjudication before or after the death of the father.
>
> (c) The paternity of the father is acknowledged in writing by the father.

The court reasoned that section 732.108(2)(b), which was enacted in 1974, created a new statutory cause of action that was not subject to the time bar imposed by section 95.11(3)(b). The court concluded that section 95.11 applied only to paternity actions brought pursuant to chapter 742.<FN 1>

At the outset, we agree with the court below that paternity may be established in the course of probate proceedings. Section 742.10, Florida Statutes (1991), confirms this, providing in part:

> 742.10 Establishment of paternity for children born out of wedlock.- This chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock. When the establishment of paternity has been raised and determined within an adjudicatory hearing brought under the statutes governing inheritance, dependency under workers' compensation or similar compensation programs, or vital statistics, it shall constitute the establishment of paternity for purposes of this chapter.

However, the fact that paternity may be adjudicated in the course of probate proceedings does not mean that section 95.11(3)(b) is inapplicable to such proceedings. To the contrary, the reasoning of the court below ignores the plain language of section 95.11(3)(b), which states that it applies to an ''action relating to the

determination of paternity.'' Clearly, an adjudication under section 732.108(2)(b) is an action relating to the determination of paternity. Furthermore, chapter 95, entitled ''Limitations of Actions; Adverse possession,'' sets forth the limitations for all civil actions or proceedings unless a different time is prescribed elsewhere. § 95.011, Fla. Stat. (1991). There is no provision in the probate code which removes paternity adjudications brought in probate from the general statute of limitations of section 95.11(3)(b). Therefore, section 95.11(3)(b) applies. The Fifth District Court of Appeal reached the same conclusion in King.

Nor do we agree that section 732.108(2)(b) creates a separate and distinct statutory cause of action which begins to run upon the death of the putative father rather than when the child reaches the age of

majority.<FN 2> While it may be presumed that most paternity actions under chapter 742 are brought in order to obtain support, any determination of paternity made in such proceedings also determines paternity for purposes of intestate succession. Whether it is brought to obtain child support payments or to establish inheritance rights, a paternity action in either case must first adjudicate the preliminary issue of paternity. The statute of limitations applies to all adjudications of paternity and does not discriminate with respect to the ultimate purpose for which they are brought. The ability to conduct adjudications of paternity within different procedural contexts or for different purposes does not make them distinct causes of action or exempt them from a generally applicable statute of limitations in the absence of legislation to the contrary. To adopt the view of the court below would mean that in every instance a paternity claim could be strategically

delayed until the death of the putative father, thereby depriving him of the opportunity to deny the claim.<FN 3> See Lalli v. Lalli, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978) (in upholding New York statute which allowed inheritance by illegitimate child only if paternity order had never been entered during child's lifetime, Court expressed concern with the availability of the putative father as a substantial factor contributing to the fact-finding process).

Scruggs relies on In re Estate of Greenwood, 587 A.2d 749 (Pa. Super. Ct. 1991), appeal denied, 600 A.2d 953 (Pa. 1991), and 600 A.2d 954 (Pa. 1991), which held that the statute of limitations for paternity actions did not apply to adjudications of paternity in probate for the purpose of proving heirship. We do not find Greenwood persuasive, as Pennsylvania's statutory framework differs from Florida's in several ways. First, the statute of

limitations at issue in Greenwood was housed in a chapter entitled ''Support Matters Generally.'' Id. at 752. Second, the Pennsylvania statute of limitations expressly referred to proceedings brought under the chapter for support. Id. Third, Pennsylvania law provided for two different standards of proof to establish paternity, depending upon the purpose for which the paternity suit was being brought. Id. at 754.

Having determined that section 95.11(3)(b) applies to any paternity action regardless of the purpose for which it is brought, we now turn to the constitutional question. When Scruggs was born, the applicable statute of limitations for paternity actions was three years running from the date of birth. A later statute which set the limitations period at four years from the date of birth was attacked in Department of Health & Rehabilitative Services v. West, 378 So. 2d 1220 [1979 Fla.SCt 3154] (Fla. 1979). West involved a paternity action

brought by the Department for the purpose of obtaining child support. However, the suit had been filed a few months after the child's fourth birthday. The Court held that section 95.11(3)(b) was unconstitutional. In reaching our conclusion, we said:

> The only proper application of the statute of limitations to child support claims would be to those claims that have accrued <pg.3>in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred. However, since the duty of support continues throughout the minority of the child, new causes of action are being created each day that the natural father does not provide support. This duty of future support cannot be barred for illegitimate children if it is allowed for legitimate children.

West, 378 So. 2d at 1228. Thus, our holding in West was based on the premise that a child has a continuing right to child support until the age of majority that cannot be cut off before it has accrued. It is clear that we did not declare the statute facially unconstitutional but rather as applied to

claims for child support.

Subsequent decisions have recognized that West declared section 95.11(3)(b) unconstitutional only as applied. In Garris V. Cruce, 404 So. 2d 785 [1981 Fla.1DCA 3249] (Fla. 1st DCA 1981), review denied, 413 So. 2d 876 (Fla. 1982)# a paternity suit was filed in 1980 seeking a determination that Garris was the child of Cruce and therefore entitled to inherit from Cruce. The court held that Garris's claim was barred by the statute of limitations because she was born in 1949. In response to the argument that West had declared section 95.11(3)(b) unconstitutional, the court referred to the language quoted above from West approving the statute of limitations insofar as it set a time period for filing claims after they had accrued. The court pointed out that the limitations period prescribed by section 95.11(3)(b) already had run by the time Garris filed suit.

The court employed a similar analysis

in J.E.W. V. Estate of John Doe, 481 So. 2d 921 (Fla. 1st DCA 1985), review denied, 484 So. 2d 9 (Fla. 1986), in which the court's entire opinion stated:

> The motion for rehearing is DENIED. State Department of Health and Rehabilitative Services v. West, 378 So. 2d 1220 [1979 Fla.SCt 3154] (Fla. 1979) is distinguishable from this case. In West the state was concerned with support of the minor child during the life of the father. The state's interest in securing support payments for the minor child is greater than avoiding stale claims. The instant case is one for declaratory judgment of paternity with no benefits sought or other relief claimed. It is a pure paternity action and barred by section 95.11(3)(b), Florida Statutes (1981). The appellant cannot seek support from the estate of his deceased father. Flagler v. Flagler, 94 So. 2d 592 [1957 Fla.SCt 407] (Fla. 1957). Flagler is a clear statement of the law and this court is obligated to follow that precedent.

Before West, this Court recognized the applicable statute of limitations in paternity actions as valid. Wall v. Johnson,

78 So. 2d 371 [1955 Fla.SCt 59] (Fla. 1955). Therefore, when Scruggs failed to bring a paternity action within the time required by the then valid statute of limitations, her claim was extinguished. Once a claim has been extinguished by the applicable statute of limitations, the claim cannot be revived because a constitutionally protected property right to be free from the claim has vested in the defendant. Wiley V. Roof, 641 So. 2d 66 [19 FLW S334, 1994 Fla.SCt 4621] (Fla. 1994); accord Firestone Tire & Rubber Co. V. Acosta, 612 So. 2d 1361 [17 FLW S646, 1992 Fla.SCt 4119] (Fla. 1992).

In 1986, subsequent to West, the legislature passed a comprehensive social services act which contained several provisions relating to paternity. Ch. 86-220, Laws of Fla. Among them was section 139, which read:

> Section 139. Paragraph (b) of subsection (3) of section 95.11, Florida Statutes, is amended to read:

> 95.11 Limitations other than for the recovery of real property.- Actions other than for recovery of real property shall be commenced as follows:
>
> (3) WITHIN FOUR YEARS.-
>
> (b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

The fact that the legislature was purporting to amend an existing statute rather than enact a new one indicates that the legislature itself recognized subsection (3)(b) was still on the books. The purpose of the amendment was to accommodate the decision in West. However, the 1986 amendment provides Scruggs no solace because even under its terms her claim had long since expired.<FN 4> Further, even if it could be argued that Scruggs was entitled to four additional years under the amended statute, she failed to make her claim within four years after the amendment was passed.

Accordingly, we find that section 95.11(3)(b) applies to paternity actions

brought in probate to determine heirship. We approve King and disapprove Odom to the extent that it conflicts with our opinion. We also hold that the application of the statute of limitations for paternity actions to Scruggs' claim is not unconstitutional. We quash the decision below and direct that the judgment of dismissal be reinstated.

It is so ordered.

(KOGAN, C.J., and OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., concur.)

FOOTNOTE 1 Chapter 742, Florida Statutes (1991), entitled ''Determination Of Paternity,'' states in section 742.011 that ''any child may bring proceedings in the circuit court, in chancery, to determine the paternity of the child when paternity has not been established by law or otherwise."

FOOTNOTE 2 Scruggs relies on In re Estate of Odom, 397 So. 2d 420 [1981 Fla.2DCA 1303] (Fla. 2d DCA 1981), for the proposition that section 732.108(2)(b) creates an entirely different cause of action. Odom, however, was concerned with reconciling section 732.108(2)(b), which allows an adjudication of paternity after death, with Bell V.

Setzer, 375 So. 2d 61 [1979 Fla.2DCA 2348] (Fla. 2d DCA 1979), which held that a paternity action for child support under chapter 742 abates upon the death of the putative father. While the duty of support of minor children may abate upon the death of the putative father, we disagree that the cause of action to establish paternity abates upon death as well. We also disagree with the premise that section 732.108(2)(b) creates an independent cause of action. That section merely explains the effect in probate of an adjudication of paternity. We note also that the child in Odom was a minor; thus, the Odom court did not address whether the statute of limitations applied in probate.

FOOTNOTE 3 Of course, the statute does not serve to bar a claim made after the death of the putative father where the claim was filed within four years of the child's reaching majority.

FOOTNOTE 4 While section 160 of chapter 88-220 stated that the amendment of any law by that act would not affect any previously accrued cause of action, this provision did not purport to reinstate causes of action.

SUPREME COURT OF FLORIDA

WEDNESDAY, JANUARY 8, 1997

IN RE: ESTATE CHARLES W. SMITH, deceased

DALE S. WILSON, et al.,
Petitioners/Appellants,

v.

SHIRLEY I. SCRUGGS,
Respondent.

CASE NOS. 84,385 & 84,386

District Court of Appeal,
1st District
No. 93-731

****

Respondent/Appellee's Motion for Rehearing filed in the above cause is hereby denied.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur
KOGAN, C.J., dissents
ANSTEAD, J. , would grant rehearing and oral argument on rehearing

TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. John Keene, Clerk
Hon. L. Thomas McAnnally, Judge
Mr. Timothy J. Corrigan
Ms. Beth E. Luciano
Mr. Bruce D. Johnson
Mr. Barry Fuller

"APPENDIX B"

Wilson V Scruggs (In re Estate of Smith)
[20 FLW S575, 1995 Fla.SCt 14870]

IN RE: ESTATE OF CHARLES W. SMITH, Deceased. DALE S. WILSON, et al., Petitioners, vs. SHIRLEY I. SCRUGGS, Respondent.

Supreme Court of Florida.

Case No. 84,385. DALE S. WILSON, et al., Appellants, vs. SHIRLEY I. SCRUGGS, Appellee.

Case No. 84,386.

November 22, 1995.

HISTORY

Two Consolidated Cases: Application for Review of the Decision of the District Court of Appeal - Constitutional Construction, and An Appeal from the District Court of Appeal - Statutory or Constitutional Invalidity. 1st District - Case No. 93-731 (Clay County).

SUBSEQUENT HISTORY

Opinion withdrawn, Substituted opinion, On rehearing, Wilson v Scruggs (In re Estate of Smith), 21 FLW 5332, 1996 Fla.SCt 10830.

"APPENDIX C"

PRIOR HISTORY

Approving, Scruggs v Wilson (In re Estate of Smith), 640 So.2d 1152, 19 FLW D1400, 1994 Fla.1DCA 4765.

COUNSEL

Counsel: Timothy J. Corrigan and Beth E. Luciano of Bedell, Dittmar, DeVault & Pillans, P.A., Jacksonville; and Bruce D. Johnson of Donahoo, Donahoo & Ball, P.A., Jacksonville, for Petitioners/Appellants. Barry Fuller of Fuller & Associates, Orange park, for Respondent/Appellee.

HEADNOTES

Estates-Paternity-Limitation of actions-Statute of limitations for adjudication of paternity is applicable in action to establish paternity in probate case for purposes of inheritance-There is no

separate and distinct statutory cause of action to establish paternity which begins to run upon death of putative father- Paternity action brought in probate is not barred by statute of limitations where statute which was in effect at time of claimant's birth was subsequently declared to be unconstitutional, and claim accrued prior to enactment of new statute of limitations governing paternity claims

OPINION

(GRIMES, C.J.) We review In re Estate of Smith, 640 So. 2d 1152 [19 FLW D1400, 1994 Fla.lDCA 4765] (Fla. 1st DCA 1994), which expressly and directly conflicts with King V. Estate of Anderson, 519 So. 2d 67 (Fla. 5th DCA 1988), and which declares a state statute to be invalid. We have jurisdiction. Art. V, § 3(b)(1), 3(b)(3), Fla. Const.

The decedent Charles Smith died in 1992, leaving a will which was admitted to probate shortly after his death. Shirley Scruggs, at the age of sixty, filed a petition for revocation of probate and letters of administration, alleging that Smith had lacked testamentary capacity to make his will and that the will was the product of undue influence. Scruggs further alleged that she was the natural daughter of Smith and would inherit under the laws of intestacy if the will were revoked.

The trial court dismissed Scruggs' claim, finding that section 95.11(3)(b), Florida Statutes (1991), the statute of limitations for adjudication of paternity, barred Scruggs' claim. The district court of appeal reversed and remanded, holding that section 95.11(3)(b) did not apply to bar Scruggs from bringing a paternity action in probate under section 732.108(2)(b), Florida Statutes (1991), for the purpose of establishing her right to

intestate succession. The district court also concluded that if section 95.11(3)(b) were construed to bar Scruggs' claim, it would be unconstitutional as applied on the ground that it violated the equal protection and access to courts provisions of this state's constitution as well as the equal protection clause of the United States Constitution.

Section 95.11 states in relevant part:

> 95.11 Limitations other than for the recovery of real property.- Actions other than for recovery of real property shall be commenced as follows:
>
> (3) WITHIN FOUR YEARS.-
>
> (b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.

In holding section 95.11 inapplicable to Scruggs' claims, the district court of

appeal referred to section 732.108(2), which reads as follows:

> (2) For the purpose of intestate succession in cases not covered by subsection (1), a person born out of wedlock is a lineal descendant of his mother and is one of the natural kindred of all members of the mother's family. The person is also a lineal descendant of his father and is one of the natural kindred of all members of the father's family, if:
>
> (a) The natural parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.
>
> (b) The paternity of the father is established by an adjudication before or after the death of the father.
>
> (c) The paternity of the father is acknowledged in writing by the father.

The court reasoned that section 732.108(2)(b), which was enacted in 1974, created a new statutory cause of action that was not subject to the time bar imposed by section 95.11(3)(b). The court

concluded that section 95.11 applied only to paternity actions brought pursuant to chapter 742.<FN 1>

At the outset, we agree with the court below that paternity may be established in the course of probate proceedings. Indeed, section 742.10, Florida Statutes (1991), provides in part:

> 742.10 Establishment of paternity for children born out of wedlock.-This chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock. When the establishment of paternity has been raised and determined within an adjudicatory hearing brought under the statutes governing inheritance, dependency under workers' compensation or similar compensation programs, or vital statistics, it shall constitute the establishment of paternity for purposes of this chapter.

This does not mean, however, that section 95.11(3)(b) is inapplicable to such proceedings. To the contrary, the reasoning of the court below ignores the plain language of section 95.11(3)(b), which

states that it applies to an ''action relating to the determination of paternity.'' Clearly, an adjudication under section 732.108(2)(b) is an action relating to the determination of paternity. Furthermore, chapter 95, entitled ''Limitations of Actions; Adverse Possession,'' sets forth the limitations for all civil actions or proceedings unless a different time is prescribed elsewhere. § 95.011, Fla. Stat. (1991). There is no provision in the probate code which removes paternity adjudications brought in probate from the general statute of limitations of section 95.11(3)(b). The Fifth District Court of Appeal reached the same conclusion in King V. Estate of Anderson, 519 So. 2d 67 (Fla. 5th DCA 1988).

Nor do we agree with Scruggs that section 732.108(2)(b) creates a separate and distinct statutory cause of action, which begins to run upon the death of the

putative father rather than when the child reaches the age of majority.<FN 2> While it may be presumed that most paternity actions under chapter 742 are brought in order to obtain support, any determination of paternity made in such proceedings also determines paternity for purposes of intestate succession. Whether it is brought to obtain child support payments or to establish inheritance rights, a paternity action in either case must first adjudicate the preliminary issue of paternity. The statute of limitations applies to all adjudications of paternity and does not discriminate with respect to the ultimate purpose for which they are brought. The ability to conduct adjudications of paternity within different procedural contexts or for different purposes does not make them distinct causes of action or exempt them from a generally applicable statute of limitations in the absence of legislation to the contrary. To adopt the

view of the court below would mean that in every instance a paternity claim could be strategically delayed until the death of the putative father, thereby depriving him of the opportunity to deny the claim.<FN 3>

Scruggs relies on In re Estate of Greenwood, 587 A.2d 749 (Pa. Super. Ct. 1991), appeal denied, 600 A.2d 953 (Pa. 1991), and 600 A.2d 954 (Pa. 1991), which held that the statute of limitations for paternity actions did not apply to adjudications of paternity in probate for the purpose of proving heirship. We do not find Greenwood persuasive, as Pennsylvania's statutory framework differs from Florida's in several ways. First, the statute of limitations at issue in Greenwood was housed in a chapter entitled ''Support Matters Generally.'' Id. at 752. Second, the Pennsylvania statute of limitations expressly referred to <pg.2>proceedings brought under the chapter for support. Id. Third, Pennsylvania law

provided for two different standards of proof to establish paternity, depending upon the purpose for which the paternity suit was being brought. Id. at 754.

Having determined that section 95.11(3)(b) applies to any paternity action, regardless of the forum in which it is brought, we would ordinarily turn to the constitutionality of applying the statute to Scruggs' petition. However, we find it unnecessary to do so because, as explained below, we conclude that section 95.11(3)(b) does not bar Scruggs' claim.

When Scruggs was born, there was a four-year statute of limitations for paternity actions. However, this statute was declared unconstitutional in Department of Health & Rehabilitative Services V. West, 378 So. 2d 1220 [1979 Fla.SCt 3154] (Fla. 1979), on the ground that it discriminated against illegitimate children.

In 1986, the legislature passed a

comprehensive social services act which contained several provisions relating to paternity. Ch. 86-220, Laws of Fla. Among them was a new statute of limitations which read:

> Section 139. Paragraph (b) of subsection (3) of section 95.11, Florida Statutes, is amended to read:
>
> 95.11 Limitations other than for the recovery of real property.- Actions other than for recovery of real property shall be commenced as follows:
>
> (3)WITHIN FOUR YEARS.-
>
> (b)An action relating to the determination of <u>paternity, with the time running from the date the child reaches the age of majority</u>.

Chapter 86-220 also contained the following:

> Section 160. The repeal or amendment of any laws by this act shall not affect any cause of action which accrued prior to, or was pending upon, the effective date of this act.

Because the old statute of limitations had been declared unconstitutional, there was no limitations provision applicable to

Scruggs' claim at the time of the enactment of chapter 86-220.<FN 4> While this act created a new statute of limitations on paternity,<FN 5> section 160 clearly preserved Scruggs' cause of action against any bar created by the new statute.<FN 6> Therefore, the current section 95.11(3)(b) is inapplicable to Scruggs because her claim had accrued prior to the enactment of chapter 86-220.

Accordingly, we find that section 95.11(3)(b) applies to paternity actions brought in probate to determine heirship. However, we reach no constitutional issue because we hold that Scruggs' claim is not barred by section 95.11(3)(b). We disapprove Odom to the extent that it conflicts with our decision in this case. We approve the decision of the court below but disapprove of its rationale insofar as it holds that section 95.11(3)(b) does not apply to paternity actions filed in probate proceedings.

It is so ordered.

(OVERTON, HARDING and WELLS, JJ., concur. SHAW, KOGAN and ANSTEAD, JJ., concur in result only.)

FOOTNOTE 1 Chapter 742, Florida Statutes (1991), entitled ''Determination Of Paternity,'' states in section 742.011 that "any child may bring proceedings in the circuit court, in chancery, to determine the paternity of the child when paternity has not been established by law or otherwise.''

FOOTNOTE 2 Scruggs relies on In re Estate of Odom, 397 So. 2d 420 [1981 Fla.2DCA 1303] (Fla. 2d DCA 1981), for the proposition that section 732.108(2)(b) creates an entirely different cause of action. Odom, however, was concerned with reconciling section 732.108(2)(b), which allows an adjudication of paternity after death, with Bell V. Setzer, 375 So. 2d 61 [1979 Fla.2DCA 2348] (Fla. 2d DCA 1979), which held that a paternity action for child support under chapter 742 abates upon the death of the putative father. While the duty of support of minor children may abate upon the death of the putative father, we disagree that the cause of action to establish paternity abates upon death as well. We also disagree with the premise that section 732.108(2)(b) creates an independent cause of action. That section merely explains the effect in probate of an adjudication of paternity. We note also that the child in Odom was a minor; thus, the Odom court did not address whether the

statute of limitations applied in probate. FOOTNOTE 3 Of course, the statute does not serve to bar a claim made after the death of the putative father where the claim was filed within four years of the child's reaching majority.
FOOTNOTE 4 Any other statute of limitations which might be said to be applicable to Scruggs' claim, see Wall V. Johnson, 78 So. 2d 371 [1955 Fla.SCt 59] (Fla. 1955), would suffer from the same deficiencies as the statute stricken in West.

FOOTNOTE 5 We recognize that section 160 refers to the ''repeal or amendment of any laws by this act,'' although at that time there was no statute of limitations on paternity actions because it had been declared unconstitutional several years before in West. However, the legislature obviously treated the statute as being still on the books and used amending language in section 139 to create a constitutional statute. Section 160 leaves no doubt of the legislature's intent to preserve existing causes of action.

FOOTNOTE 6 While the legislature could have provided a reasonable time for those affected by the statute to sue, see Folev v. Morris, 339 So. 2d 215 [1976 Fla.SCt 2681] (Fla. 1976), it chose to fully protect all existing causes of action which were already extinguished.

Scruggs V Wilson (In re Estate of Smith)
[19 FLW D1400, 640 So.2d 1152, 1994 Fla.1DCA 4765]

IN RE: ESTATE OF CHARLES W. SMITH, Deceased. SHIRLEY I. SCRUGGS, Appellant, V. DALE S. WILSON and HAROLD "BUDDY" JIMMISON, CO-PERSONAL REPRESENTATIVES, H.H. ADAMS, FLORA C. JONES, LOUISE G. SMITH, FRANK 0. YOUNG, ALMA YOUNG, his wife, CLYDE S. HICKS and HAROLD ''BUDDY'' JIMMISON, Individually, Appellees.

1st District.

Case No. 93-731.

Opinion filed June 29, 1994.

HISTORY

An appeal from the circuit court for Clay County. L. Thomas McAnnally, Judge.

SUBSEQUENT HISTORY

Review granted, 651 So.2d 1196.

Approved, Wilson V Scruggs (In re Estate of Smith), 20 FLW S575, 1995 Fla.SCt 14870.

COUNSEL

Counsel: Barry J. Fuller, Orange Park, for

Appellant. Bruce D. Johnson of Donahoo, Donahoo & Ball, Jacksonville, for Appellees.

HEADNOTES

Estates-Paternity-Limitations statute for adjudications of paternity does not apply to action to establish paternity in probate case for purposes of inheritance-Where decedent did not die until 1992, retroactive application of 1986 statute to bar cause of action which, under the terms of the statute, would have expired in 1957, violates constitutional right of access to courts.

OPINION

(KAHN, J.)

Shirley I. Scruggs appeals from a final summary judgment in which the trial court determined that the statute of limitations in section 95.11(3)(b), Florida

Statutes (1991), bars her from bringing an action to determine her paternity for purposes of intestate succession. We find that Ms. Scruggs may institute an action to establish her paternity in a probate proceeding and reverse.

Ms. Scruggs was born out of wedlock in 1932. Her birth certificate lists her parents as Emily Isabel Johns and Charles Smith. Charles W. Smith died January 18, 1992. On January 28, 1992, his will was admitted to probate, and appellees Dale S. Wilson and Harold ''Buddy'' Jimmison were appointed personal representatives. Ms. Scruggs was not a beneficiary under the will. On April 20, 1992, Ms. Scruggs filed a Petition for Revocation of Probate and Letters of Administration in which she alleged that Smith lacked testamentary capacity to make his will and that the will was the product of undue influence. Ms. Scruggs maintained that she was the natural daughter of Smith and would inherit under

the laws of intestacy if the trial court revoked the will. The personal representatives moved to dismiss for lack of standing. The trial court granted the motion to dismiss, finding that Ms. Scruggs' claim was barred by the statute of limitations for adjudication of paternity, section 95.11(3)(b), Florida Statutes (1991).<FN 1> Ms. Scruggs filed a motion for rehearing which was denied. Ms. Scruggs then filed an Amended Petition for Revocation of Probate and Letters of Administration in which she alleged that Smith had acknowledged paternity in writing. The personal representatives filed a Motion for Summary Judgment which the trial court granted after determining that there was no factual issue as to the allegation that Smith acknowledged paternity of Ms. Scruggs since Ms. Scruggs failed to submit any proof of the allegation. The trial court also reiterated its prior ruling that the statute of

limitations bars Ms. Scruggs from adjudicating her paternity.

An illegitimate child is a lineal descendant of the father if ''[t]he paternity of the father is established by an adjudication before or after the death of the father.'' § 732.108(2)(b), Fla. Stat. (1991)(e.s.). Prior to the effective date of this provision in 1976, an illegitimate could only inherit from the father if the father had acknowledged the child in writing. § 732.29, Fla. Stat. (1973).<FN 2>

Section 732.108(2)(b) does not by its terms require the adjudication of paternity by an action pursuant to chapter 742. To the contrary, it would seem to us that inclusion in the Probate Code, chapter 732, of a provision allowing intestate succession by the illegitimate child of a father indicates that the issue of paternity may be properly adjudicated in

the probate proceeding. Indeed, chapter 742 confirms our view:

> This chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock. When the establishment of paternity has been raised and determined within an adjudicatory hearing brought under the statutes governing inheritance, dependency under workers' compensation or similar compensation programs. or vital statistics, it shall constitute the establishment of paternity for purposes of this chapter.

§ 742.10, Fla. Stat. (1991) (e.s.).

Since establishment of paternity may be accomplished ''under the statutes governing inheritance,'' we must determine whether the limitations provision relied upon by the trial judge, section 95.11(3)(b), applies to the present action, brought pursuant to section 732.108(2)(b).

Before its 1986 amendment, section 95.11(3)(b) provided merely that an action relating to the determination of paternity must be brought within four years. This

provision had existed since 1974. § 95.11(3)(a), Fla. Stat. (Supp. 1974). Its antecedent in the lineage of current section 95.11(3)(b) was enacted in 1959 as section 95.11(9), Florida Statutes (1959), and was the first statute of limitations made specifically applicable to paternity actions.<FN 3> This law provided that an action to establish paternity must be brought before the child reaches the age of four years or within four years of the last payment of support by the alleged father. On its face, then, the precursor statute fits within the framework of an action for support.

In further exploring the applicability of the statute of limitations, it is useful to examine the derivation of the Probate Code section under which appellant seeks her remedy. Before 1974, an illegitimate child could not inherit from her father unless the father had acknowledged the

child in writing. § 731.29, Fla. Stat. (1973). The present section 732.108(2)(b) emanates from chapter 74-106, Laws of Florida. Since an illegitimate who could not prove written acknowledgement could not inherit before passage of this law, we may safely conclude that during such time a paternity statute of limitations could never have been applied to bar determination of the right to inherit, nor could such an application have been contemplated by the legislature.

After the enactment of section 732.108(2)(b), a court observed that the ''legislature clearly intended that an action could be maintained for the determination of paternity for inheritance purposes . . . .'' In re Estate of Odom, 397 So.2d 420 [1981 Fla.2DCA 1303], 422 (Fla. 2d DCA 1981). The same court approved the holding of C.L.W. v. M.J., 254 N.W.2d 446 (N.D. 1977), in which the North Dakota

Supreme Court held "that the mother's right to bring an action during the father's lifetime to obtain a determination of paternity and support is a separate and distinct remedy from an action to determine paternity for the right to inherit.'' 397 So. 2d at 424. The North Dakota court said, and we now agree, ''The two are separate remedies for separate purposes." 254 N.W.2d at 450.

Acknowledging that the action to inherit is a separate remedy from a paternity action to establish support, we should not merely assume that the same statute of limitations applies to each. The action to inherit is a distinct statutory cause of action, not within the contemplation of the bar imposed by section 95.11(3)(b). The trial court erred by construing section 95.11(3)(b) as applying to frustrate appellant's effort to establish paternity solely for purposes of inheritance.

Moreover, having examined this matter in light of the Florida Constitution, we question the trial court's use of a 1986 statute to bar a cause of action which, under the terms of the statute, would have expired in 1957, four years after appellant attained her majority. Absent clear legislative intent to the contrary, the presumption is against retroactive application of a statute of limitations. Durring v. Reynolds, Smith & Hills, 471 So.2d 603 [10 FLW 1545, 1985 Fla.1DCA 2306] (Fla. 1st DCA 1985). Here, since Mr. Smith did not die until 1992, retroactive application of the statute would violate Ms. Scruggs' constitutional right of access to the courts in contravention of article I, section 21 of the Florida Constitution. Overland Constr. Co.. Inc. v. Sirmons, 369 So.2d 572 [1979 Fla.SCt 577], 573 (Fla. 1979).<FN 4>

We recognize that Durring and Overland Constr. Co. tested the constitutionality of

statutes of repose, and not statutes of limitation. These cases nonetheless apply to our analysis. This is so because in the present case the statute, as applied by the trial court, acts as a statute of repose, barring appellant's cause of action long before it ever accrued. See Whigham v. Shands Teaching Hosp. and Clinics. Inc., 613 So.2d 110 [18 FLW D407, 1993 Fla.lDCA 265], 112, n.4 (Fla. 1st DCA 1993) (''A statute of limitations normally governs the time within which legal proceedings must be commenced after the cause of action accrues. A statute of repose, however, limits the time within which an action may be brought and is not related to the accrual of any cause of action . .

In 1979 the supreme court in State. Department of Health and Rehabilitative Services v. West, 378 So.2d 1220 [1979 Fla.SCt 3154] (Fla. 1979), found section 95.11(3)(b), Florida Statutes (1975),<FN 5> to be unconstitutional under the state and

federal constitutions. The court weighed the state's objective to avoid stale claims against the impact of the statute upon illegitimates deprived of their right to support. The observations of the West court, striking down the statute on equal protection grounds, are instructive today:

> Although proof of paternity may become more difficult with the passage of time, this mere possibility cannot be allowed to work an unconstitutional discrimination against illegitimate children.
>
> The only proper application of the statute of limitations to child support claims would be to those claims that have accrued in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred. However, since the duty of support continues throughout the minority of the child, new causes of action are being created each day that the natural father does not provide support. This duty of future support cannot be barred for illegitimate children if it is allowed for legitimate children.

378 So. 2d at 1227-1228. The court thus

addressed, and rejected, a policy argument based upon reducing stale claims. Further, although the court spoke in the idiom of equal protection, its resolution of the issue is germane to access to courts analysis-a support claim that had not yet accrued could not be barred. Thus unaccrued future support, available to legitimate offspring, could not be denied those born out of wedlock.

Ms. Scruggs' right to inherit did not vest until Smith died in 1992. § 732.101(2), Fla. Stat. (1991); Garris v. Cruce, 404 So.2d 785 [1981 Fla.1DCA 3249] (Fla. 1st DCA 1981), rev. denied, 413 So.2d 876 (Fla. 1982). It is well established that a statute of limitations will not begin to run until the occurrence of the last event which gives rise to the cause of action. § 95.031, Fla. Stat. (1991); Keller v. Reed, 603 So.2d 717 (Fla. 2d DCA 1992); Hynd v. Ireland, 582 So.2d 772 [16 FLW

D1847, 1991 Fla.4DCA 3003] (Fla. 4th DCA 1991). This maxim is inconsistent with an application of section 95.11(3)(b), since the statute purports to bar the action four years after the child attained the age of majority, an event which, as we have observed, took place some thirty-five years before Smith died. Preemption of appellant's claim by use of a statute which never allowed the claim to arise offends the Florida Constitution. We reach this result on access to courts grounds. We note, however, that a decision otherwise would place a burden on an illegitimate child seeking to inherit, not shared by legitimate offspring. West, supra. But see, Lalli v. Lalli, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978) (Supreme Court without majority opinion upheld a New York statute which allowed an illegitimate child to inherit only if a court, during the father's lifetime, has entered an order declaring paternity).<FN 6> As applied

below, the statute also treats similarly situated illegitimate children with disparity-for the child whose father dies during the child's minority, the right to seek inheritance is always preserved; for the child who is twenty-two or older at her father's death, the right would never be preserved.

Section 95.11(3)(b), as crafted by the legislature and applied by the trial court, would retroactively bar an action over three decades before the action accrued.<FN 7> It would also bar an action that was unknown to Florida law at the time the supposed bar attached. We conclude that the legislature, when it last amended the statute in 1986, neither anticipated nor intended its applicability to the facts at bar. Therefore on both statutory construction grounds and constitutional grounds we hold that section 95.11(3)(b) may not be utilized to bar appellant's action for inheritance. Since her petition

was timely for purposes of the Probate Code, she may proceed.

REVERSED and REMANDED.

(ERVIN and JOANOS, JJ., CONCUR.)

FOOTNOTE 1 Section 95.11(3)(b), Florida Statutes, provides that an ''action relating to the determination of paternity" must be brought within four years, "with the time running from the date the child reaches the age of majority.''

FOOTNOTE 2 This provision was held unconstitutional because it violated an illegitimate child's right to equal protection. In re Estate of Burris, 361 So.2d 152 [1978 Fla.SCt 1877] (Fla. 1978).

FOOTNOTE 3 Prior to 1959, a ''bastardy'' proceeding was subject to a three year statute of limitations under former section 95.11(5)(a) which applied to ''a liability created by statute.'' Wall v. Johnson, 78 So.2d 371 [1955 Fla.SCt 59], 373 (Fla. 1955).

FOOTNOTE 4 Florida's constitutional guarantee of access to courts restrains the legislature from abolishing a pre-existing statutory or common-law cause of action without providing an alternative form of redress. See Kluger v. White, 281 So.2d 1

[1973 Fla.SCt 3209] (Fla. 1973). The right to prove paternity in court was originally established by the Bastardy Act of 1828. B.J.Y. v. M.A., 617 So.2d 1061 [18 FLW S265, 1993 Fla.SCt 1617] (Fla. 1993).

FOOTNOTE 5 This is the same statute as section 95.11(3)(a), Florida Statutes (Supp. 1974), supra.

FOOTNOTE 6 Although we note the result in Lalli, we need not share the United States Supreme Court's concern with the availability of the putative father as "a substantial factor contributing to the fact-finding process." 439 U.S. at 271-272 (Powell, J. with two justices concurring). In Florida, the legislature has already decided that paternity may be proven after the father's death. §732.108(2)(b); West,, 378 So. 2d at 1225, n. 5.

FOOTNOTE 7 In Doe v. Shands Teaching Hospital and Clinics. Inc., 614 So.2d 1170 [18 FLW D585, 1993 Fla.1DCA 584] (Fla. 1st DCA), rev. denied, 626 So.2d 204 (Fla. 1993), we upheld the medical malpractice statute of repose, section 95.11(4)(b), Florida Statutes (1983), in the face of an access to courts challenge, even though the claim in that case was barred before the plaintiff knew or could have reasonably known she had an injury. As we specifically noted, however, a different analysis could be made where a new statutory enactment intervened to abolish an existing cause of action. 614 So. 2d at 1171. Here the 1986 statute came into being many years after appellant surpassed four years beyond the age of majority. The right of action in the present case is more like that in Diamond v. E.R. Squibb & Sons. Inc., 397 So.2d 671 [1981 Fla.SCt 1219] (Fla. 1981).

IN THE CIRCUIT COURT FOR
CLAY COUNTY, FLORIDA
PROBATE DIVISION
FILE NO. :92-14-CP
DIVISION:C

IN RE:
ESTATE OF CHARLES W. SMITH, Deceased

SHIRLEY I. SCRUGGS,
PETITIONER

V.

DALE S. WILSON AND HAROLD "BUDDY" JIMMISON, CO-PERSONAL REPRESENTATIVES, H.H. ADAMS, FLORA C. JONES, LOUISE G. SMITH, FRANK 0. YOUNG, ALMA YOUNG, his wife, CLYDE S. HICKS and HAROLD "BUDDY" JIMMISON, Individually, RESPONDENTS

FINAL JUDGMENT

THIS cause coming to be heard upon Respondents', DALE S. WILSON and HAROLD "BUDDY" JIMMISON, Motion For Summary Judgment and counsel for both parties being present and before tiie Court, and the Court having heard the arguments of counsel and being fully advised in the premises finds that none of the three alternatives under Florida Statutes Section 732.100(2) can be met to establish Petitioner as a potential

heir and Petitioner is not an interested party to challenge decedent's will because:

1. There is no genuine factual issue as to Petitioner's allegation that the decedent acknowledged paternity of the Petitioner in writing due to Petitioner's failure to submit any substantiation for that allegation;

2. Petitioner has acknowledged that her mother was never married to the decedent and that the decedent was never adjudicated to be her father; and

3. Adjudication of paternity is barred by the Statute of Limitations.

It is thereupon,

ADJUDGED THAT:

1. Respondents' Motion For Summary Judgment is hereby granted.

2. Petitioner's First Amended Petition For Revocation Of Probate And Letters Of Administration is hereby dismissed with prejudice and final judgment is entered for Respondents.

DONE AND ORDERED at Green Cove Springs, Clay County, Florida this 8th day of February, 1993.

L.Thomas McAnnally /s/
CIRCUIT JUDGE

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CHART I
TIMELINE COMPARISON
FACTUAL AND STATUTORY INTERACTIONS

YEAR	STATUTE OF LIMITS. OR EVENT	ILLEGIT. RIGHT TO ADJUDICATE PATERNITY	ILLEGIT. RIGHT TO INHERIT BY ADJUDICA-TION
1932	BIRTH OF PETITIONER	NO	NO
1932	S/L 3 YEARS FROM BIRTH	NO	NO
1935	FIRST S/L RUNS IF APPLIED	NO	NO
1936	1959 S/L RUNS IF APPLIED	NO	NO
1957	1986 S/L RUNS IF APPLIED	NO	NO
1959	S/L AMENDED 4 YEARS FROM BIRTH	NO	NO
1976	S/L 4 YEARS FROM BIRTH OR LAST SUPPORT	NO	RIGHT FIRST GIVEN

"APPENDIX F"

1986	S/L AMENDED 4 YEARS RUNNING FROM AGE OF MAJORITY (21)	RIGHT FIRST GIVEN TO ILLEGIT.	YES